STATE OF MICHIGAN

IN THE SUPREME COURT

HELEN YONO,

Plaintiff/Appellee,

v.

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant/Appellant.

Supreme Court No._____

Court of Appeals Docket No.308968

Court of Claims No. 11-117-MD

L. PAGE GRAVES (P51649)
SMITH & JOHNSON, ATTORNEYS, P.C.
Attorneys for Appellee
P.O. Box 705
Traverse City, MI 49685
(231) 946-0700

BILL SCHUETTE (P32532)
KATHLEEN A. GLEESON (P55752)
MICHAEL H. DITTENBER (P72238)
MICHIGAN DEPARTMENT OF ATTORNEY GENERAL
Transportation Division
Attorneys for Appellant
425 W. Ottawa Street
Lansing, MI 48913
(517) 373-1470

150364

APPELLEE'S ANSWER IN OPPOSITION TO APPELLANT'S APPLICATION FOR LEAVE

Dated: November 13, 2014.

L. Page Graves (P51649)
Attorney for Appellee

TABLE OF CONTENTS

Page

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

INDEX OF AUTHORITIES

STATEMENT OF JUDGEMENT/ORDER MDOT SEEKS LEAVE TO APPEAL FROM AND RELIEF SOUGHT

Except for the relief sought by Appellant, Appellee concurs with Appellant's statement of the judgment/order it seeks leave to appeal from. For relief, however, Appellee respectfully requests that this Honorable Court not reverse its decision in *Nawrocki v Macomb County Rd Comm,* 463 Mich 143 (2000). In so doing, Appellee requests that this Honorable Court affirm the judgment/order of the Court of Claims and the Court of Appeals, below; alternatively, Appellee requests that this Court affirm the denial of MDOT's motion, without prejudice, and remand this case back to the Court of Claims for further factual development, as aforesaid, where-after MDOT may refile a revised summary motion based upon a more complete record.

COUNTER-STATEMENT OF QUESTION INVOLVED

I. WHETHER *NAWROCKI v MACOMB COUNTY RD COMM*, 463 Mich 143 (2000) WAS REVERSED BY *GRIMES V DEP'T OF TRANSPORTATION*, 475 Mich 72 (2006)?

Appellee answers:	"No."
Appellant answers:	"Yes."
The Court of Appeals Answered	"No."
The Court of Claims answered	"No."

COUNTER-STATEMENT OF FACTS

Facts Regarding Helen Yono's Incident

Appellee, Helen Yono states in her Verified Affidavit that she and her daughter visited the Village of Suttons Bay to do some shopping. (*Plaintiff's Brief In Opposition*, Exhibit 9, ¶ 2). Mrs. Yono and her daughter parked their car in the parallel parking lane for the east side of M-22. Id, ¶ 4. Mrs. Yono's intended destination was to visit a local art gallery across the street. Id, ¶ 3. She exited her vehicle and then crossed M-22, only to learn that the gallery had closed. Id, ¶ 5. Therefore, Mrs. Yono turned around proceeded back to her parallel parked car. Id, ¶ 6. Mrs. Yono was walking on the roadbed surface and intended to step off of the roadbed surface and onto the sidewalk. Id, ¶ 7. It was at this very juncture that Mrs. Yono's left foot stepped into a defect in the actual roadbed surface of M-22, which was a proximate cause for her to roll her left ankle, lose her balance, fall and sustain a serious fracture to her ankle. Id, ¶ 7 and sub-exhibit 9 (D). See, infra, Yono Location of Roadbed Surface Defect photo.

Facts Regarding Rachel Nawrocki's Incident

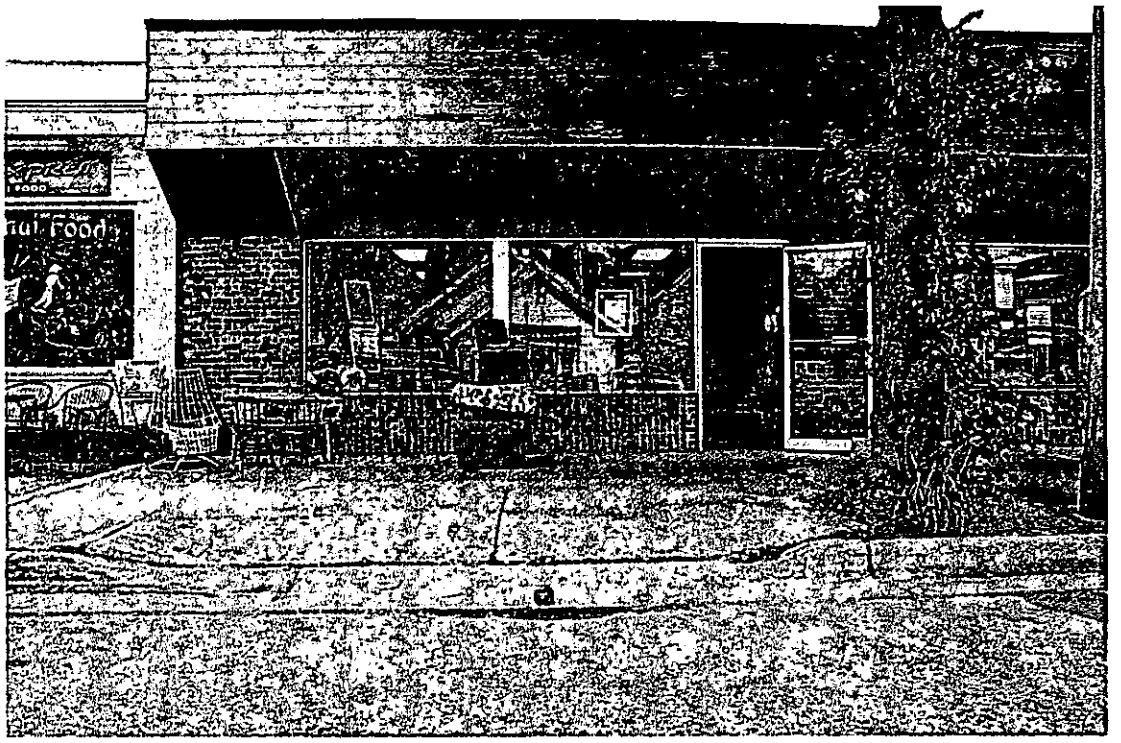
Mrs. Rachel Nawrocki states in her Verified Affidavit that she and Mr. Nawrocki parallel parked their car on Kelly Road, next to the concrete gutter and curb. (*Plaintiff's Brief In Opposition*, Exhibit 1, ¶ 5; see also, sub-exhibit B, Appendixes 8a-11a). Mrs. Nawrocki testified further that after she exited her truck and walked down toward the rear of her parked motor vehicle, she stood on the curb and looked for oncoming traffic. Id, ¶ 7 and Appendix 10a, lines 1-4. Mrs. Nawrocki testified that she then stepped off of the curb, about 6 to 12 inches from the curb, right onto the road surface and into the defect that caused her to fall. Id, ¶ 8, sub-exhibit B, Appendix 11a, lines 23-24; see also, ¶ 9 and sub-exhibit A and B,

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

Appendixes 38a-39a, which are photographs of the defect and location on Kelly Road in relationship to the first driveway north of Rockport Street. Mrs. Nawrocki testified that she fell toward her parallel parked truck. Id, ¶ 9; see also, sub-exhibit B, Appendix 11a, lines 12-13. See, infra, photo Nawrocki Location of Roadbed Surface Defect photo.

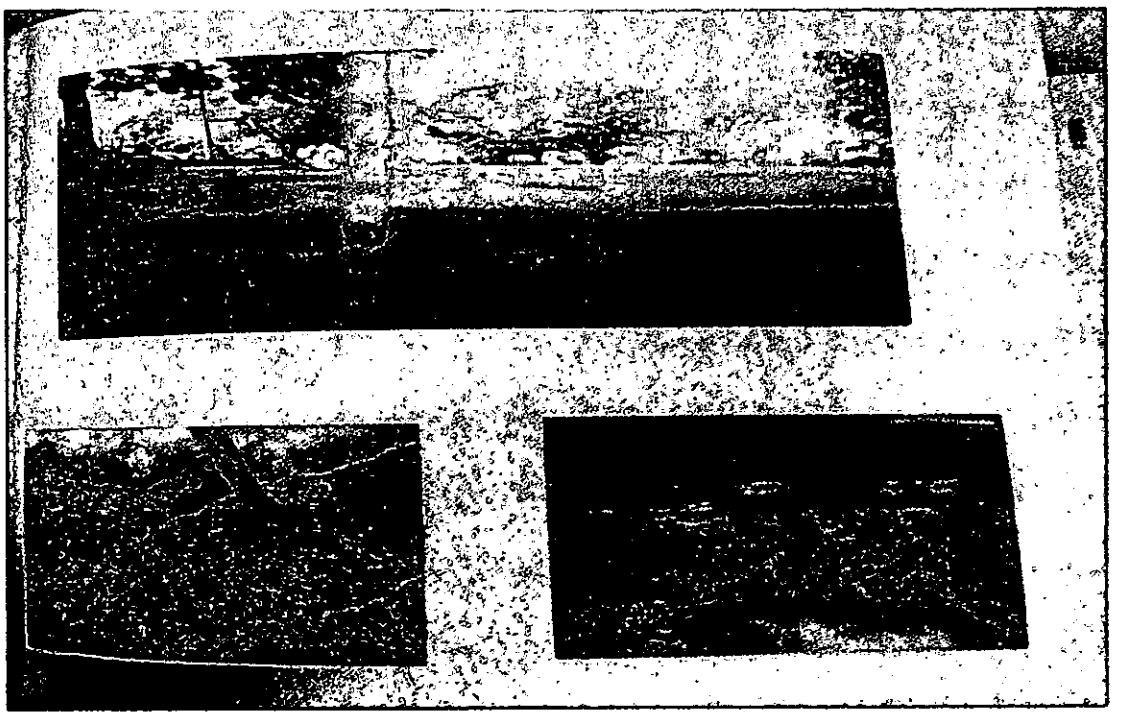
SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

Photos of Locations of Yono's and Nawrocki's Roadbed Surface Defects



Yono location

[*Plaintiff's Brief In Opposition*, Exhibit 9, Affidavit of Helen Yono, sub-exhibit E]



Nawrocki location

[*Plaintiff's Brief In Opposition*, Exhibit 1, Affidavit of Rachel Nawrocki, sub-exhibit A, which was attached as her Appendix 39a, to *Nawrocki's Brief On Appeal* to this Michigan Supreme Court]

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

CONCURING STATEMENT OF THE STANDARD OF REVIEW

Appellee concurs with Appellant's statement of the standard of review.

ARGUMENT

I. MDOT'S APPLICATION LACKS TRADITIONAL GROUNDS FOR INSTITUTIONAL REVIEW, AS CONTEMPLATED BY MCR 7.302(B).

Appellee remains steadfast that *Nawrocki v Macomb Co Rd Comm,* 463 Mich 143 (2000)(Authored by Markman, J.) is dispositive. At page 152, the Court described the substantive facts as follows:

> "On May 28, 1993, plaintiff Rachel Nawrocki was a passenger in a truck driven by her husband. He parked the truck next to the curb on Kelly Road,[1] in Macomb County, and Nawrocki exited from the passenger side onto the grass between the street curb and the sidewalk. She walked the length of the truck and stepped off of the curb onto the paved roadway. Nawrocki allegedly stepped on cracked and broken pavement on the surface of Kelly Road and sustained serious injuries to her right ankle, necessitating several operations."

In *Nawrocki,* the Court held that pedestrians, generally, are a protected class that may claim under § 1402. In this regard, the court reasoned,

> "Moreover, because the state and county road commissions must 'repair and maintain' their respective highways and roads so that they are 'reasonably safe and convenient for public travel,' and because we believe 'public travel' encompasses *both* vehicular and pedestrian travel, the plain language of the highway exception cannot be construed to afford protection only when a dangerous or defective condition 'of the improved portion of the highway designed for vehicular travel' affects *vehicular* travel." Id, p 171 (emphasis in original).

The Court held further that state and county road authorities owe pedestrians a higher duty of care relative to repair and maintenance. The court reasoned that just because a roadway may be in reasonable repair and safe for *vehicular* travel, such does not mean *ipso facto* that it satisfies the standard for *public* travel. In this regard, the court stated at footnote 28,

[1] Notably, there is nothing in the opinion that suggests that parallel parking was not allowed on Kelly Road.

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

> "We acknowledge that repairing and maintaining the improved portion of the highway in a condition reasonably safe and convenient for *public* travel represents a higher duty of care on the part of the government than repairing and maintaining it for *vehicular* travel." Id (emphasis in original).

And finally, consistent with the fourth sentence of § 1402, the court clarified that pedestrian claims qualify provided the *location* of the alleged defect is not within a sidewalk, crosswalk, or any other installation outside of the improved portion the road designed for vehicular travel. In so holding, the court acknowledged the potential for inconsistent results that may occur between a person crossing a roadway at a crosswalk versus a pedestrian stepping out of his/her parallel parked car on the roadway. In this regard, the court explained at footnote 27,

> "We are not unaware of the potential for today's holding to result in outcomes that appear illogical or incongruous. For example, a pedestrian injured by a dangerous or defective condition located within a crosswalk, which is arguably integrated into a roadbed, may not be able to plead in avoidance of governmental immunity, ***while a pedestrian who steps out of a vehicle, onto the paved or unpaved portion of the roadbed used by vehicular traffic, and is injured by a dangerous or defective condition within the roadbed itself, may proceed under the highway exception.*** However, such an anomalous result appears compelled by the language of the highway exception." Id, p 172 (emphasis supplied).

With this legal framework established, the court applied its interpretation of § 1402 to the uncontested facts in *Nawrocki,* and held that such implicated the highway exception. Id., p 172. Again, Mrs. Nawrocki's car was parallel parked on the roadway next to the concrete gutter and curb, adjacent to the *through lane.* Appellee remains steadfast, as it did during mini-oral argument before this Court, that *Nawrocki* stands for the proposition that a parallel parking lane was implicated in the Court's analysis that Mrs. Nawrocki's claim fell within the highway exception. Although the court held *Nawrocki* pleaded in avoidance of governmental immunity, it made clear that was not the end of the analysis in the case itself; rather, Mrs. Nawrocki still faced her remaining burden to prove her negligence theory that the road authority failed to repair and maintain the highway. Id. In this regard, this Court

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

expressly stated at footnote 29,

> "As noted by this Court in *Suttles,* 457 Mich. At 651, n. 10, 578 N.W.2d 295, simply falling within the highway exception is not the end of the analysis. After successfully pleading in avoidance of governmental immunity, a plaintiff still must prove a cause of negligence under traditional negligence principles. . . ." Id.

It is for this very reason that Appellee remains steadfast that *Nawrocki* remains dispositive. There is no other logical interpretation of this Court's express language to suggest anything other than a parallel parking lane implicates the highway exception. If this Court were to accept Appellant's flawed reasoning that *through lanes* are the *only travel lanes* actionable under § 1402, to the exclusion of all other regularly used and contemplated travel lanes (e.g., center lanes, passing lanes, exit lanes, entrance lanes and parallel parking lanes), you literally curb *Nawrocki* into parking and walking down the *through lane* in violation of the MVC, MCL 257.672. The Court in *Nawrocki* recognized this illogical absurdity in footnote 27, *supra.* Why and where else would a pedestrian step out of a motor vehicle "***onto the paved or unpaved portion of the roadbed used by vehicular traffic***" but a designated parking space, parallel or otherwise? Id. Respectfully, the Appellant's repeated reasoning that only through lanes are travel lanes is erroneous and must be rejected.

It is MDOT who is the appellant who has the burden to demonstrate that it is entitled to summary disposition under MCR 2.116(C)(7). A (C)(7) motion is like a hybrid (C)(8) and (C)(10). MDOT deliberately chose the (C)(8) route in its summary motion, its claim of appeal and its first application for leave to appeal under *Grimes*. It did not prevail. What MDOT is trying to do now is abruptly switch its arguments on appeal, even though it never raised them in its summary motion or its claim of appeal or first application for leave to appeal to this Court. Because it has failed as a matter of law to prevail on paint-marking theory under *Grimes*, while MDOT repeats that argument again under the newly crafted label

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

"geometrical design" it is also now crafting a last-minute factual argument which it never raised before. And so now, having never raised the question before, Appellant now criticizes Appellee's proofs -- when no discovery has been allowed -- and criticizes Appellee's expert's credentials and opinions. As a matter of law, MDOT is precluded from raising this new argument at this late stage because it failed to properly raise/preserve the issue initially. MCR 7.212(C)(5); *Busch v Holmes,* 256 Mich App 4, 12 (2003); *Bailey v Schaaf (On Remand),* 304 Mich App 324, 244-246 (2014). MDOT abandoned the issue on its original appeal. *Wilson v Taylor,* 457 Mich 232, 243 (1998); *Mitcham v Detroit,* 355 Mich 182, 203 (1959).

Notwithstanding the foregoing, if, as Appellant suggests, Appellee's expert's affidavit is conclusory in nature, then if examined with the same microscope, what is MDOT's expert's affidavit? The Court of Appeals correctly ruled that MDOT's expert's opinions were themselves, conclusory because Mr. Neimi -- more than once – "then concluded, without stating how he reached this conclusion, that parallel parking lances are not 'designed for vehicular travel.'" Slip Op, p 11; see, also, p 12 ("Similarly, while he asserted that parallel parking lanes are not designed for vehicular travel, Neimi did not explain the basis for that assertion. . . "). For this reason, the Court of Appeals correctly rejected MDOT's expert's affidavit as insufficiently establishing a factual basis to supports its initial burden as the moving party under MCR 2.116(C)(7). Id., p 12. Parenthetically, Appellee suspects she knows why MDOT is throwing this last minute *new,* unpreserved argument on appeal up against the wall: it is because the truth of the matter is that permitted discovery will indisputably document and prove what Appellee's expert has already sufficiently identified

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

factually, to wit: that from curb to curb, the roadway is actually used by vehicles and pedestrians alike and that the subject defect located within the roadbed surface of the subject parallel parking was/is designed for vehicular travel.

Justice dictates that Appellee be allowed a fair opportunity to explore these facts more fully during open discovery. The calculated sniper like defense/effect built into MCR 7.202(6)(a)(v) is patently unfair to the plaintiff who has pleaded sufficient facts in avoidance of immunity, thus prevailing on the hybrid (C)(8)[2] legal question but then on remand, is to now be criticized for allegedly not sufficiently substantiating those factual allegations with sufficient factual proof under (C)(10) when the plaintiff was never permitted the opportunity to discover from MDOT evidence on a question it did not even consider on appeal.

CONCLUSION AND RELIEF REQUESTED

MDOT has failed to identify any sub-category of institutional review under MCR 7.302(B) that warrants accepting its application for leave to appeal, again.

Alternatively, there are only two decisional paths this Court now has to procedurally choose from: (1) affirm the Court of Appeals' opinion on remand; or (2), affirm the denial of MDOT's motion, without prejudice, and remand this case back to the Court of Claims for further factual development, as aforesaid, where-after MDOT may refile a revised summary motion based upon a more complete record.

[2] Appellee remains steadfast that she has pled facts implicating the highway exception. Id and see, e.g., *Verified Complaint*, ¶¶ 8, 10, 11 and 12. While the Appellant similarly failed to preserve the issue and abandoned its after-the-fact criticisms of Appellee's pleading, the Court of Appeals did not err in concluding Appellee sufficiently pleaded her complaint that implicated the highway exception. Slip Op, p 6. And the court further correctly pointed out that, hypothetically, if there was a magic word pleading requirement that were to exist, Appellee would be granted the opportunity to cure such hypothetical deficiency, as contemplated by MCR 2.118(A)(2). Slip Op, pp 12-13.

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

WHEREFORE, Appellee respectfully requests that this Honorable Court deny the Appellant's application for leave.

Respectfully submitted,

SMITH & JOHNSON, ATTORNEYS, P.C.

Dated: November 13, 2014.

L. Page Graves (P51649)
Attorneys for Appellee